Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICHARD E. WIKBERG, PETITIONER,

v.

RICHARD B. REICH, SECRETARY OF LABOR,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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15pp

QUESTION PRESENTED FOR REVIEW

Whether the provisions of the Vietnam Era Veteran's Readjustment Assistance Act of 1974 proscribing employment discrimination against Vietnam era veterans confers upon such veterans a constitutionally protected property interest which interest cannot be terminated by the Department of Labor without due process under the Fifth Amendment.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

RICHARD E. WIKBERG, Petitioner

v.

RICHARD B. REICH, Secretary of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD E. WIKBERG, the petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on April 7, 1994. Rehearing was denied on May 6, 1994

OPINIONS BELOW

The April 7, 1994 opinion of the Court of Appeals, rehearing denied on May 6, 1994, whose judgment sought to be reviewed is reported at 21 F.3d 188 and reprinted in the Appendix to this Petition, pp.30-38. The prior opinion of the United States District Court for the Northern District of Illinois, Eastern Division is reported at 62 Empl. Prac. Dec. P 42,618, 125 Lab.Cas. P 10,758 and is reprinted in the Appendix to this Petition, pp. 39-53.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1994, and rehearing was denied May 6, 1994. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves constitutional provisions, statutes, rules and regulations, the pertinent text which of are set forth in the Appendix as follows:

1. The Fifth Amendment to the Constitution of the United States.

2. Vietnam Era Veterans Readjustment Act of 1974, 38 U.S.C. §§ 2011 et. seq.

3. 41 CFR § 60-250.4(a)

4. 41 CFR § 60-250.6(a)

5. 41 CFR § 60-250.25(a)

6. 41 CFR § 60-250.26(e)

STATEMENT OF THE CASE

This is an action brought by Richard E. Wikberg, ("Wikberg" or "Petitioner") pursuant to 28 U.S.C., § 1331, seeking judicial review of the determination of the Office of Federal Contract Compliance Programs ("OFCCP") arising from a complaint filed by Wikberg under the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C., § 2012 ("VEVRA" or the "Act").

On March 19, 1985, Moore Business Forms ("Moore"), a United States Government contractor offered Wikberg, a Vietnam-era veteran covered by VEVRA, a position as manager of sales and

marketing systems at a salary of $51,000.00 per year. In its position description, Moore required that a candidate for Wikberg's position have a minimum of a general business degree from college, or the equivalent, and at least 8 years experience within Moore, with some information services background. At no time relevant hereto did Wikberg satisfy such criteria. On March 22, 1985, Wikberg accepted Moore's employment offer, and on April 22, 1985 Wikberg began his employment at Moore. Wikberg's employment was terminated at Moore on October 20, 1986. On June 16, 1987, Wikberg filed a complaint with the United States Department of Labor alleging violations of the non-discrimination provisions of VEVRA by Moore. Under VEVRA Moore was obligated to take affirmative action to employ and advance in employment qualified veterans of the Vietnam era. Moore was subject to the rules and regulations enacted to ensure compliance with VEVRA which are found in 41 C.F.R., Chap. 60-250.1 et. seq., wherein among other

directives a government contractor must treat qualified Vietnam era veterans without discrimination based upon veteran status in all employment practices, including employment upgrading, demotion or transfer, recruitment, advertising, layoff or termination.

In December, 1987, an equal opportunity specialist for the OFCCP investigated Wikberg's complaint. The investigation conducted by the OFCCP specialist consisted of a short interview with Wikberg, interviews with Moore's representatives at Moore's offices in Glenview, Illinois, and submission by Wikberg and Moore of certain documents.

On January 19, 1988, Wikberg submitted to the OFCCP the names of witnesses who possessed relevant information regarding Wikberg's termination, and Wikberg also identified certain critical documents containing other relevant information.

The OFCCP failed to interview any of those persons identified by Wikberg in his January 19,

1988 correspondence, and failed to review the bulk of the documents identified by Wikberg. During the investigation by the OFCCP Wikberg was not afforded the right to cross-examine any of Moore's witnesses, nor was Wikberg provided an opportunity to test the credibility of Moore's witnesses, nor determine the veracity or authenticity of any documents submitted by Moore. Furthermore, several of the critical documents submitted by Moore were inaccurate and the OFCCP relied on such documents to reach its decision.

On March 28, 1988, the OFCCP determined that Moore did not violate its obligations under the non-discrimination and affirmative action provisions of VEVRA and declined to take enforcement action. A copy of the results of the investigation by the OFCCP is reprinted in the Appendix to this Petition, pp. 54-61.

On April 11, 1988, Wikberg requested that the OFCCP review its decision rendered on March 28, 1988, and identified certain documents and

individuals possessing additional relevant information to Wikberg's termination. Many of such documents were not reviewed and individuals so identified by Wikberg were not interviewed. The review by the OFCCP affirmed the previous determination, which review is reprinted in the Appendix to this Petition, pp. 62-64.

On November 5, 1991, Wikberg filed a complaint in the District Court seeking review of the decision of the OFCCP finding that Moore had not violated VEVRA. On January 8, 1992, Lynn M. Martin, then Secretary of the United States Department of Labor (the "Secretary") filed a motion to dismiss the complaint, which motion was granted on January 29, 1992, and further granted to Wikberg leave to file an amended complaint. Wikberg filed an amended complaint on September 30, 1992, alleging, inter alia, that Wikberg's constitutional right of due process was violated by the OFCCP. The District Court entered an Order on May 28, 1993, dismissing the amended complaint in its

entirety. Wikberg then appealed this decision to the Court of Appeals which court affirmed the decision of the District Court on April 7, 1994, and denied rehearing on May 6, 1994.

THE RULINGS BELOW

The District Court ruled that regardless of whether an agency's action is committed to discretion by law, that action may be reviewed to determine if the Constitution has been violated. Padula v. Webster, 822 F2d 97 1328 (D.C. Cir. 1987). The District Court then performed the Constitutional litmus test to determine whether Wikberg possessed a property interest or entitlement to continued employment of which he could not be deprived without due process. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). Applying the guidelines of Roth the District Court held that VEVRA did not create an entitlement to employment with a federal contractor and further held the only right created by VEVRA was the right to petition the Department of Labor to

enforce employers contractual obligations created by statute. Heckler v. Chaney, 470, U.S. 821 (1985). The District court further held that an agency's refusal to act generally does not implicate personal constitutional rights of liberty or property. Chaney. Last, the District Court cited the distinction between adjudicatory and investigatory investigations holding that traditional notions of Fifth Amendment due process do not attach to the latter. Clementson v. Donovan, 608 F. Supp. 152, 156 (D.C. Hawaii 1985).

The Court of Appeals agreed with the District Court ruling that Wikberg did not possess a constitutionally cognizable property interest in that Wikberg was an "at will" employee of Moore and that he had no property interest in continued employment as defined by Roth. Additionally, the Court of Appeals held that Wikberg was terminated by Moore not by the Department of Labor. Consequently, such private action was outside of the scope of Fifth

Amendment due process rights. The Court of Appeals however conceded that Wikberg in fact may have had a right to employment but that this Court's ruling in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, (1989), holding that due process is not implicated where an agency fails to investigae a claim foreclosed any action under the due process clause.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED INASMUCH AS THE UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The District Court and the Court of Appeals have both concluded that the non-discrimination provisions of VEVRA do not confer upon Vietnam-era veterans a constitutionally protected property interest in continued employment. The decisions below relied upon the Roth definition of "property" without providing much guidance as

to the reasoning the courts employed in reaching this conclusion. In this Court's decisions involving judicial review of agencies' actions the opportunity to review colorable constitutional claims has rarely been presented. Specifically, the Chaney court expressly excluded from its decision cases raising issues of violation of constitutional rights by an agency's refusal to institute proceedings. In the case presently before this Court this is the very issue which has been raised by Petitioner.

The lower courts have uniformly held that otherwise unreviewable agency action may be reviewed to determine whether the Constitution has been violated. Padula v. Webster, 822 F.2d 97, 101 (D.C. Cir. 1987) and this Court has held that judicial review is presumed when constitutional issues are presented. Califano v. Sanders, 430 U.S. 99 (1977); Webster v. Doe, 486 U.S. 592 (1988). Such being the case, the question of determining the existence of the predicate of this type of constitutional claim,

i.e., the existence of a property interest, must necessarily be addressed. It has been Petitioner's consistent position in the lower courts that he has been vested with a property interest entitling him to continued employment of which he cannot be divested without constitutional due process. The foundation for this position is provided by Roth which holds that:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Roth at 577.

This Court in Perry v. Sinderman, 408 U.S. 593 (1972) echoed Roth and further held that property interests requiring procedural due

process protection are not limited by a few rigid technical forms. Such property interests include a broad range of interests that are secured by "existing rules or understandings." Doe v. Milwaukee City, 903 F.2d 499, 503 (1990), further defined and entitlement as

> ...a legally enforceable interest in receiving a governmentally conferred benefit, the initial receipt or the termination of which is conditioned upon the existence of a controvertible and controvertible fact. Such an interest cannot be impaired or destroyed without prior notice to the beneficiary and a meaningful opportunity for him to be heard for the purpose of resolving the factual issue. 903 F.2d.

In McGee v. Funderburg, 17 F.3d 1122 (1994), it was specifically held that veteran employment preference by Federal agencies or contractors pursuant to Federal Statute was an "earned entitlement".

Additionally, the courts have ruled that regulations or rules such as those implementing VEVRA may create constitutional "liberty" or "property." Miller v. Hinman, 804 F2d 421 (7th Cir. 1986); Agnes Hill, et. al., v. Group Three Housing Development Corporation, et. al., 799 F2d 385 (8th Cir. 1986).

Relevant also to the issues herein is that property interests in continued employment may be created by statute or by contract, Bishop v. Wood, 426 U.S. at 345 (1975), and that employees may establish the existence of constitutionally protected property in continued employment by demonstrating a reasonable expectation based upon rules or regulations concerning discharge. Merritt v. Mackey, 827 F2d 1328 (9th Cir. 1987).

In the case at bar Wikberg has satisfied the tests enunciated in Roth and Sinderman. Indisputably, Wikberg is a Vietnam era veteran as defined by VEVRA. It is Wikberg's contention that he was hired solely on the basis of his veteran status in order for Moore to satisfy the

affirmative action provisions of VEVRA inasmuch as Wikberg did not possess the fundamental skills nor education required by the offered position. It is Wikberg's position that as a member of a class singled out by Congress to be protected from employment discrimination, Wikberg had an entitlement to such a benefit promulgated by the aforesaid Federal regulations and Federal statutes. Specifically, VEVRA and its accompanying regulations prohibit the termination of Wikberg's employment on the basis of his veteran status. That is to say, Wikberg had a property interest in his continued employment with Moore insofar as he could be terminated for any cause whatsoever except on the basis of his veteran status. Stated simply, it is Wikberg's contention that but for his veteran's status, Wikberg would not have been terminated. As a result Wikberg has satisfied the criteria set forth in Roth and Sinderman, and, therefore, due process rights should attach.

In summary, the statutes and regulations cited above guarantee that once a Vietnam veteran is employed by a Federal contractor the veteran will not be terminated on the basis of his veteran's status, which in the case at bar would have entitled Wikberg, and all other similarly situated, to continued employment.

It is clear from a plain reading of VEVRA and its implementing regulations that it was the intent of Congress to protect from employment discrimination a class of persons consisting of Vietnam veterans, much in the same manner as it sought to protect other classes such as minorities. By the mandate of VEVRA and its implementing regulations there was conferred upon Wikberg and those similarly situated a special privilege to not be terminated from his employment due to his veteran status.

Although the lower courts acknowledged the availability of judicial review where colorable constitutional claims were presented both the District Court and the Court of Appeals were

unpersuaded that Wikberg could invoke the due process clause of the Fifth Amendment. Wikberg believes that the courts below reached this conclusion by misapprehending Wikberg's claim and by misapplying the holdings of several similar but distinguishable cases.

First, Chaney was cited for the proposition that generally an agency's refusal to initiate enforcement does not implicate personal constitutional rights. However, this Court expressly left open the door for judicial review where, as in the present case, colorable constitutional claims are raised. Chaney at 838.

Next, the District Court cited Brown v. Sibley, 650 F 2d 760 (5th Cit. 1981), and related cases stating that Brown held that a similar federal statute did not create an entitlement to employment. Wikberg disagrees with the District Court in that Brown and it progeny simply held that no private cause of action could be implied from the federal statute

and therefore a member of the protected class could not directly bring an action to enforce its provisions. In the case at bar Wikberg has not sued the Department of Labor to enforce his rights; he has sought judicial review of the agency's findings. The District Court also ruled that the function performed by the OFCCP was investigatory as opposed to adjudicatory and such distinction was dispositive of this case. It is true that 41 C.F.R. § 60-250.26 provides that the OFCCP shall "investigate" the complaint. However, this provision goes further providing that after investigation the OFCCP shall "recommend findings and resolution." Clearly, this not merely an investigatory function that is "purely fact-finding" as held by this Court in Hannah v. Larche, 363 U.S. 420 (1960). It is Wikberg's contention that the OFCCP's action was ajudicatory as defined by this Court in Hannah where it was held:

> ...when governmental agencies adjudicate or make binding determinations which

directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have been traditionally associated with the judicial process. Hannah at 442.

Applying the foregoing test to the instant case the OFCCP made a binding determination which directly affected Wikberg's right of continued employment and therefore due process should be afforded him.

The Court of Appeals construed Wikberg's action as seeking an injunction demanding the Department of Labor to conduct a new investigation of his complaint. This is not the case. Wikberg, as hereinabove recited is seeking judicial review of the decision of the OFCCP. The Court of Appeals further intimated that Wikberg's employment was "at will" but also recognized that VEVRA may in fact confer upon Vietnam-era veterans a property interest arising under the Fifth Amendment. However, the Court of Appeals ruled that inasmuch as Wikberg was

deprived of his property right by Moore, a private entity, no state action was involved foreclosing Wikberg's constitutional claim. Wikberg responds that his hiring by Moore was motivated solely by the mandates of VEVRA inasmuch as Wikberg did not possess the qualifications for his position and consequently satisfied the "close nexus" test as cited by this Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). Wikberg asserts that Moore's actions, were "significantly encouraged" by VEVRA which transmuted this private party's action into that of the state. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 547 (1987). Last, the Court of Appeals held as dispositive this Court's holding in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). It is Wikberg's belief however, that DeShaney is inapposite in that this Court expressly held that the issue of statutory "entitlement" was not considered.

DeShaney at 195 footnote 2. But, here, this is the very issue which Wikberg has raised. DeShaney should not be controlling.

II

THIS COURT'S GUIDANCE WOULD RESOLVE AN ISSUE AFFECTING A CLASS OF POTENTIALLY SEVEN MILLION VIETNAM-ERA VETERANS

The question presented herein has far-reaching implications and is not unique to Wikberg's specific claim. With over seven million male Vietnam Era Veterans in the labor force as of November, 1987, [1] the majority of whom would be covered by the provisions of VEVRA, this Court's guidance would go a long way in defining such veterans' rights, resolving extant ambiguities and obviating the necessity of additional lawsuits of this nature. This Court has generally and expressly held in abeyance such guidance inasmuch as the issue of property interests arising from similar federal statutes has not been squarely or properly

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[1]Monthly Labor Review April, 1990.

before this Court.

We now submit this issue, respectfully, and without adornment, for the Court's consideration.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

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Appendix A

RICHARD E. WIKBERG, Plaintiff-Appellant

v.

ROBERT B. REICH, Secretary of Labor,

Defendant-Appellee.

WIKBERG v. REICH

No. 93-2781

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

March 2, 1994, Argued

April 7, 1994, Decided

SUBSEQUENT HISTORY: Petition for Rehearing Denied May 6, 1994.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 91 C 7085. George M. Marovich, Judge.

COUNSEL: For RICHARD ERIC WIKBERG, Plaintiff - Appellant:

Andrew R. Jarett, Robert N. Weiner, JARETT & WEINER, Northfield, IL.

For ROBERT B. REICH, Secretary, United States Department of Labor, Defendant - Appellee:

Michele M. Fox, AUSA, OFFICE OF THE UNITED STATES ATTORNEY, Civil Division, Appellate Section, Chicago, IL.

JUDGES: Before POSNER, Chief Judge, and CUMMINGS and MANION, Circuit Judges.

OPINIONBY: POSNER

OPINION: POSNER, Chief Judge. The Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. @@ 4211-14, requires firms that have contracts with the federal government to promise in their contracts not to discriminate against any employee or applicant for employment because he is a veteran of the Vietnam War. But the Act goes further, and requires the contractor to discriminate in favor of such veterans. Pursuant to the second requirement, a firm that had a federal contract hired Mr. Wikberg, a Vietnam veteran, as a sales manager, even though he did not meet the firm's usual qualifications for such a post. Eighteen months later the firm fired Wikberg, claiming that his performance was

unsatisfactory. The Vietnam Era Veterans Readjustment Assistance Act does not create a private right of action but it does entitle a Vietnam veteran who believes that his employer has violated the Act to file a complaint with the Department of Labor, and it requires the Department to "promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations." 38 U.S.C. @ 212(b). Wikberg complained and the Department conducted an investigation, upon the conclusion of which it notified him that it would not take any action against his employer because it had found insufficient evidence that the firm had violated the Act. 41 C.F.R. @ 60-250.26(g)(1).

Wikberg then brought this suit, which the district court dismissed for failure to state a claim, against the Department of Labor. The suit is within the jurisdiction of the federal courts (assuming Wikberg has standing to sue, of which more shortly) because it presents a

federal question, 28 U.S.C. @ 1331, not, as the parties believe, because the Administrative Procedure Act gives the federal courts jurisdiction to entertain suits against federal agencies; it does not. Califano v. Sanders, 430 U.S. 99, 105-07, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977). The suit complains that the investigation conducted by the Department infringed Wikberg's constitutional rights in two respects. It deprived him of a property right to continued employment by not granting him a hearing at which to present evidence controverting the evidence that his employer had submitted to the Department in response to the investigation. And it denied him the equal protection of the laws because the Department provides Vietnam veterans with fewer procedural rights than it provides persons complaining of violations of other statutes that it administers. Both claims were based on the due process clause of the Fifth Amendment, the first directly, the second obliquely, that clause

having been interpreted to place the federal government under the same duty of equal protection that the Fourteenth Amendment places the states. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975). Wikberg sought an injunction commanding the Department to conduct a new investigation of his complaint in conformity with the procedures that he claims the Constitution commands. Of course he would benefit from the new investigation only if in the end the Department decided to take remedial action against the contractor and in a form that would benefit Wikberg. At the moment all he wants is that the Department be ordered to do a better job of investigation; and "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." Linda R.S. v. Richard D., 410 U.S. 614, 619, 35 L. Ed. 2d 536, 93 S. Ct. 1146 (1973). But Wikberg claims that the Constitution entitles

him to the aid of the Department of Labor in enforcing his right to employment, and whether the claim is right or wrong (wrong, we shall see) it is distinct from a mere interest in a prosecuting authority's policies. Cf. Banks v. Secretary of Indiana Family & Social Services Administration, 997 F.2d 231, 238-41 (7th Cir. 1993).

Wikberg has not pressed his equal protection claim in this court, and it is therefore forfeited. He does press his due process claim, but it fails for want of a property interest. So far as appears, Mr. Wikberg was an employee at will of Moore Business Forms, the firm that hired and then fired him; and an employee at will has no legal right of any sort to continued employment--his only right is to be paid for the work he has done. Wikberg does not claim to have been deprived of that right. But even if he had an employment contract of fixed duration, or one of indefinite duration terminable only for

cause, and hence the kind of contractual right that counts as "property" under the due process clause of the Fifth and Fourteenth Amendments, Board of Regents v. Roth, 408 U.S. 564, 576-77, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), he was not deprived of that right by the Department. He was deprived of it by his employer, Moore.

The Department failed, it is true, to protect Wikberg's right to employment, if he had such a right, and maybe he did have one--conferred by the Vietnam Era Veterans Readjustment Assistance Act. But we know from DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989), that the failure of a government agency to protect the life, liberty, or property of a person from private violence or other private invasion or deprivation does not count as a deprivation of that interest by the government itself and therefore is not actionable under the due

process clause. DeShaney involved the due process clause of the Fourteenth Amendment but the principle is equally applicable to the due process clause of the Fifth Amendment. Id. at 196; Piechowicz v. United States, 885 F.2d 1207, 1214 n. 9 (4th Cir. 1989). In DeShaney, Wisconsin had established an agency to investigate child abuse, and through negligence the agency failed to protect the plaintiff from his abusive father. In this case, Congress has established an agency to investigate violations of the Vietnam Era Veterans Readjustment Assistance Act and maybe by failing to follow sound procedures the agency failed to protect Mr. Wikberg from the unlawful activity of his employer. They are the same case. As for any argument that 38 U.S.C. @ 4212(b), in imposing on the Department of Labor a duty of prompt investigation and appropriate action, confers more than the usual "right" to the aid of the law enforcement authorities--confers in fact the kind of entitlement that might count as

property under the due process clause--it founders on the principle that procedural rights are not rights of liberty or property within the meaning of the due process clause. Olim v. Wakinekona, 461 U.S. 238, 250-51, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983); Doe v. Milwaukee County, 903 F.2d 499, 503 (7th Cir. 1990).

Apart from his constitutional claims, Wikberg argues that he is a third-party beneficiary of the contract between his employer and the federal government and can therefore enforce the veterans' benefit provision of it directly. But he forfeited this argument (which in any event appears barred by D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1478-84 (7th Cir. 1985), a nearly identical case) by failing to make it in the district court. Moreover we do not understand the relevance of the argument to a suit against the Department of Labor. If the argument is correct, Wikberg can sue the contractor directly.

AFFIRMED.

Appendix B

RICHARD ERIC WIKBERG, Plaintiff,

v.

LYNN M. MARTIN, n1

Secretary of the United States Department of Labor, Defendant.

n1 The new Secretary of Labor is Richard Reich.

WIKBERG v. MARTIN

91 C 7085

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

May 28, 1993, Decided

May 28, 1993, Docketed

JUDGES: MAROVICH

OPINIONBY: GEORGE M. MAROVICH

OPINION: MEMORANDUM OPINION AND ORDER

Plaintiff, Richard Eric Wikberg ("Wikberg"), seeks judicial review of the final determination by Office of Federal Contract Compliance Programs ("OFCCP") n2 that there was insufficient evidence to conclude that Moore Business Forms ("Moore"), whose equal employment

opportunity practices are monitored by the United States Department of Labor, discriminated against him in violation of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. @ 4212 ("VEVRA"). It is Wikberg's position that the OFCCP violated his due process rights by not providing him with a hearing, by not allowing Wikberg to cross-examine or otherwise challenge the authenticity or veracity of evidence presented by Moore and otherwise depriving Wikberg of any opportunity to controvert evidence provided by Moore. Wikberg further contends that his equal protection rights have been violated because the Labor Management Relations Act, which is also administered by the Department of Labor, provides more comprehensive and expansive rights than VEVRA. The Secretary has moved to dismiss Wikberg's complaint.

For the following reasons, the Secretary's motion is granted.

- - - - - - - - - - -Footnotes- - - - -- -

n2 Wikberg has named as defendant, Lynn Martin, Secretary of Labor of the United States Department of Labor. The Secretary has delegated enforcement of VEVRA to the OFCCP. The OFCCP is responsible for investigating employment discrimination complaints filed by disabled veterans and veterans of the Vietnam era against federal government contractors and subcontractors.

- - - - - - - -End Footnotes- - - -- - - - - -

BACKGROUND

In June 1992, Wikberg filed a complaint with the Department of Labor stating his belief that he was terminated from Moore due to his status as a Vietnam veteran. The complaint was referred to the OFCCP. The OFCCP investigated Wikberg's charge and concluded that there was insufficient evidence of discrimination on the part of Moore. Instead, the OFCCP concluded that Moore terminated Wikberg because of "poor work performance." Wikberg requested that the Director of OFCCP review the

Chicago area office's decision. Based upon a review and analysis of the case file, the Director affirmed the decision. Consequently, OFCCP did not instigate enforcement proceedings against Moore.

The Director's decision constitutes the final agency decision and exhausted the administrative procedures available to Wikberg under the Act.

In his original complaint, Wikberg asked this court to review the findings and conclusions of OFCCP pursuant to the Administrative Procedures Act, 5 U.S.C. @ 551 ("APA"). Since OFCCP's decision not to enforce Wikberg's claim of discrimination under VEVRA is committed to the agency's sound discretion by law, this court concluded that OFCCP's decision not to seek enforcement was unreviewable under the APA. Therefore, this court granted defendant's motion to dismiss.

At the time we dismissed the original complaint, however, we afforded Wikberg the

opportunity to file an amended complaint to raise any appropriate due process claims. In his amended complaint, Wikberg asserts that he was deprived of a sufficient opportunity to rebut the evidence presented by Moore to OFCCP and, therefore, that he was denied due process. Wikberg further alleges that because OFCCP did not follow the procedures other agencies follow when conducting investigations, Wikberg was deprived of equal protection under the United States Constitution.

DISCUSSION

1. Due Process Claim

Even though an agency's action is committed to agency discretion by law, that action may be reviewed to determine if the Constitution has been violated. Padula v. Webster, 261 U.S. App. D.C. 365, 822 F.2d 97, 101 (D.C. Cir. 1987). Wikberg's first claim is a due process challenge to the procedures used to deprive him of his alleged constitutionally and statutorily guaranteed right not to have his property

interest in employment limited or terminated as a result of his status as a Vietnam veteran. In order to state a colorable due process claim, Wikberg first must establish that he has a constitutionally protected liberty or property interest in employment. Bd. of Regents v. Roth, 408 U.S. 564, 570-71, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Even if Wikberg can show that he was deprived of a protected property interest, he must still establish what process was due. Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972).

The threshold issue, therefore, is whether VEVRA creates an entitlement to a job with a Federal contractor. The answer is no. Property interests are not created by the Constitution but by statute or by state law. See Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). VEVRA requires that federal contracts contain an affirmative action clause which requires the contractor to "employ and advance in employment qualified special disabled

veterans and veterans of the Vietnam era." 38 U.S.C. @ 4212(a). These regulations, however, do not provide veterans with a vested interest in a job with a federal contractor. The only right created by VEVRA is the right to petition the Department of Labor to enforce the employers' contractual obligations created by the statute. See 38 U.S.C. @ 4212.

More specifically, VEVRA grants a special disabled veteran or veteran of the Vietnam era the right to file a complaint with the Department of Labor stating his or her belief that a contractor "has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans." 38 U.S.C. @ 4212(b). Once a complaint is filed, Congress left it to the agency's discretion how to implement the duty to "promptly investigate such complaint and take appropriate action . . . . " 38 U.S.C. @ 4212. n3

- - - - - - - - - -Footnotes- - - - - - - - - -

n3 Investigations by OFCCP are governed by 41 CFR Part 60-250.26(e) which provides:

The Department of Labor shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record. A complete case record consists of the following: (1) name and address of each person interviewed; (2) a summary of his or her statement; (3) copies of summaries of pertinent documents; (4) a narrative summary of the evidence disclosed in the investigation as it related to each charge, and (5) recommended findings and resolution.

- - - - - - - - - -End Footnotes- - - - - - - -

Wikberg's rights are limited to those created by Congress. The plain language of this statute does not create a constitutionally protected property interest or entitlement in employment. The case law overwhelmingly supports this conclusion. In Heckler v. Cheney, the court acknowledged that an agency's decision not to initiate enforcement generally does not implicate personal constitutional rights involving liberty or property interests. "When an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." 470 U.S. at 832.

Federal courts that have reviewed parallel statutes requiring federal contracts to contain affirmative action clauses for qualified disabled individuals have similarly concluded that such clauses do not create an entitlement to employment. See Brown v. Sibley, 650 F.2d 760, 764 (7th Cir. 1981); Rogers v. Frito-Lay,

611 F.2d 1074, 1980 (5th Cir. 1980); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1244 (7th Cir. 1980); Kilmer v. U.S. Dept. of Labor, 1989 U.S. Dist. 52 FEP Cases 835, 837 (S.D.N.Y. 1989). In Brown, 650 F.2d at 764, the plaintiff brought a class action alleging employment discrimination in violation of @ 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. @ 793, and the Fourteenth Amendment. Like VEVRA, the Rehabilitation Act requires federal contractors not to discriminate against disabled individuals. The court concluded that the only right secured to a handicapped person under the Act was the right to file a complaint with the Department of Labor stating his belief that a "contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals." 29 U.S.C. @ 793(b). In accord Simpson, 629 F.2d at 1244 (Congress apparently intended the filing of a complaint with the Department of Labor to be the

appropriate means for a private individual to enforce the contractual obligation created by @ 503). n4 This is the only right created by VEVRA.

- - - - - - - - - - - - -Footnotes-- - - - - - -

n4 Wikberg argues that Brown and the cases cited by Brown are inapplicable to this case since the plaintiffs in Brown sued the private employer as opposed to the Secretary of Labor. We do not feel that difference is determinative in this case. At issue in all of these cases is whether the statutory language of the particular act in question creates a federal right in favor of the plaintiff.

- - - - - - - - - - - - -End Footnotes- - - - -

Similarly, the decision not to initiate enforcement procedures does not give rise to a due process violation. VEVRA and its implementing regulations distinguish OFCCP's investigatory function from the adjudicatory function performed by the Department's Assistant Secretary in the event that OFCCP chose to

pursue enforcement proceedings. 41 CFR 60-741.29 and part 60-30. This distinction has proved determinative in a case involving a similar challenge to OFFCP's investigatory process and the decision not to enforce an allegation of discrimination under VEVRA.

In Clementson v. Donovan, 608 F. Supp. 152, 156 (D.C. Hawaii 1985), aff'd on other grounds sub nom Clementson v. Brock, 806 F.2d 1402 (9th Cir. 1986) the court stated: OFCCP performed an investigatory function, not an adjudicatory one. Further, in non-adjudicatory fact-finding investigations, the traditional notions of Fifth Amendment Due Process do not attach. We agree with this reasoning. The investigation undertaken by the OFCCP on behalf of Wikberg was not an adjudicatory proceeding. Therefore, the decision not to initiate enforcement does not implicate personal constitutional rights involving liberty interests.

We conclude that Wikberg has failed to establish that VEVRA creates a constitutional

protected interest in a job with a federal contractor. Consequently, Wikberg has no constitutional basis for arguing that these statutory provisions should be expanded to require the OFCCP to afford Wikberg with a full-blown adjudication of his charge of discrimination while OFCCP is investigating the complaint.

2. Equal Protection Claim

Wikberg also claims that his rights to equal protection under the United States Constitution has been violated because he believes that OFCCP did not investigate his charge in the same manner as the National Labor Relations Board investigates charges of unfair labor practices. Although Wikberg never addresses his equal protection claim in his response to the Secretary's motion to dismiss, Wikberg appears to be arguing that Congress has an obligation to enact identical legislation when protecting different groups for different purposes. n5 The Equal Protection Clause imposes

no such requirement.

- - - - - - - - - - - - - -Footnotes- - - - - - -

n5 On December 31, 1992, Wikberg's attorney filed "Plaintiff's Memorandum in Reply to Defendant's Memorandum in Support of Defendant's Motion to Dismiss. " On the same date, Wikberg, acting pro se, filed a "Supplemental Memorandum in Support of Motion to Deny Dismissal" without leave of court. We have disregarded this additional memorandum.

- - - - - - - -End Footnotes- - - - - - - - -

The purpose of the Equal Protection Clause is to assure that the "principles of law which officials would impose upon a minority must be imposes generally." Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112, 93 L. Ed. 533, 69 S. Ct. 463 (1949). Thus, the Equal Protection Clause requires that all similarly situated individuals receive equal treatment. This standard is clearly met under VEVRA. VEVRA does not contain any classification scheme which resulted in different treatment of Mr. Wikberg

as compared to any other individual or group of individuals protected by the Act.

CONCLUSION

For the reasons stated above, the Secretary's motion to dismiss Wikberg's complaint in its entirety is granted with prejudice.

ENTER:

GEORGE M. MAROVICH

UNITED STATES DISTRICT JUDGE

DATED: May 28, 1993

Appendix C

Richard E. Wikberg
18035 Cherrywood
Homewood, Illinois 60430

Complainant

Complaint Number: E840385

Moore Business forms
1205 N. Milwaukee Ave.
Glenview, Illinois 60028

Contractor

NOTIFICATION OF RESULTS OF INVESTIGATION

On December 12, 1987, the Office of Federal Contract Compliance Programs, U.S. Department of Labor initiated an investigation of the allegation of handicapped discrimination made in the complaint of Richard E. Wikberg filed on June 10, 1987. Our investigation has resulted in the following findings:

1. Moore Business Forms is a government subcontractor and is not exempt from Section 503 of the Rehabilitation Act of 1973, as amended.

2. Richard E. Wikberg is a Vietnam Era Veteran within the meaning of (38 USC 2012) the Vietnam Era Veteran Readjustment Assistance Act of 1973, as amended, and the regulations at 41 CFR Chapter 60, as appropriate. The 180 day filing time requirement was met.

3. The complainant alleges the contractor violated its obligations under the non-discrimination and affirmative action provisions of its federal contract by laying him off and terminating him because of Veteran status. He alleges he was told when he was laid off his position would not be filled due to the reduction in force. Subsequently he learned the company had an individual with his title, Manager, National Sales and Marketing System. He alleges these actions occurred after he identified himself as a Veteran.

4. The company's response is: First, Richard Wikberg's charge is untimely filed. He was terminated on October 20, 1986. His complaint

was filed on June 16, 1986, more than six months after the date of separation.

Second The company feels his lay-off while coincidental with the company's reduction in force was in fact due in his performance of duties. The company stated the lay-off was at Richard Wikberg's option - in order to receive lay-off benefits. He would have been terminated following a 90 day probationary period. His job as System Manager was re-assigned to another Manager, not eliminated. The company reduced its Table of Organization Managers, from five to four and re-aligned duties. The contractor's position is the complainant had ample opportunity to demonstrate his performance capabilities under three different supervisors and two Human Resources Directors. He was given the choice of resigning with 3 months severance benefits or going on 90 day probation. He chose the probation period. He failed to show adequate improvement at the 30 day and 60 day evaluations. He then requested to be put on a

lay-off status. Because the contractor was laying-off some personnel, his request was granted. The contractor denies any connection between his termination and his Veteran status.

5. Based on our investigation, which included an on-site visit to the Moore Business Forms facility, interviews with company employees and company officials, former employees and the complainant are not supported by the evidence. On December 12, 1987, this office initiated an investigation of the allegations of Mr. Richard Wikberg vs. Moore Business Forms. The results of the investigation follow:

3/19/85 Moore Business Forms offered position (paying $41,000) to Richard Wikberg.

3/22/85 Richard Wikberg accepted the position and requested educational assistance.

4/22/85 Richard Wikberg commenced work at Moore Business Forms.

6/26/85 90 day initial probation meeting when a $2,250 bonus kicked in.

9/17/85 Request to enter Northwestern

University education program denied by Human Resources Manager because it would have taken time from his work.

2/86 Request by Richard Wikberg for position up-grade. No action, based on the rationale that the request was not justified.

3/14/86 Performance evaluation indicating some problems and Richard Wikberg's response.

6/4/86 Meeting of Richard Wikberg and Human Resources Manager (Mr. Bauman) regarding problems of promotion of Richard Wikberg's subordinates.

6/9/86 Memo from Bauman to Richard Wikberg regarding unavailability of assigned reports for April, May and June.

6/13/86 Memo from Bauman to Richard Wikberg regarding overdue consolidation plan.

6/16/86 Memo from Bauman to Richard Wikberg regarding problems with Richard Wikberg's preparation for Dento

Conference and difference of perception of Richard Wikberg's responsibilities.

7/28/86 Request to Richard Wikberg from subordinate for input and support.

7/30/86 Request to Richard Wikberg from subordinate MacDonald regarding concern with Richard Wikberg's input in decision-making process.

8/20/86 Richard Wikberg received notice of probation from McFarland, Richard Wikberg's supervisor.

8/25/86 Richard Wikberg's response.

9/9/86 Articles of Probation of Richard Wikberg.

10/8/86 Letter to Richard Wikberg concerning probationary performance.

10/13/86 Letters to Richard Wikberg concerning probationary performance.

10/20/86 Termination of Richard Wikberg.

Moore Business Form's personnel file had no record of Richard Wikberg's self-identification

as a Vietnam Era Veteran. Concerning Moore Business Forms layoffs, 20% of 470 facility employees were laid off, of which 1 of Richard Wikberg's four subordinates was included.

Moore Business Forms Vietnam Era Veterans include:

#1 hired 1/5/85 as Program Manager at $56,000 per annum;

#2 hired 12/84 Operations Manager at $50,000; and

#3 hired 5/87 Senior Programmer Manager.

Number for and Five included two programmers.

The file of responses to the invitation to identify one's self as a covered veteran was reviewed. No problems were noted.

Richard Wikberg's initial job application identified himself as a Vietnam Era Veteran. The company has no evidence of his response to the self identification request although Richard Wikberg submitted a copy of his response.

Richard Wikberg's job was Manager, National Sales, Marketing Systems, a part of Information

Services. 80% of his job duties covered guiding, directing and approving the activities of Systems and Programming personnel.

The records indicate:

1. Moore Business Forms has a satisfactory Affirmative Action Program for Vietnam Era Veterans;
2. It has issued invitations for covered veterans to self-identify themselves;
3. It has hired Vietnam Era Veteran for positions of responsibility; and
4. It has documented its progressive steps to alert Richard Wikberg of performance problems and to terminate him because of perceived failure to correct them.

There was no evidence to indicate his veteran status had any impact on his termination.

/s/ Carol Kiran 3/25/88

Carol Kiran

Area Office Director

Chicago Area Office

Appendix D

Mr. Richard E. Wikberg

18035 Cherrywood

Homewood, Illinois 60430

Dear Mr. Wikberg:

On April 11, 1988, you requested that the Director review the decision made by our Chicago Area Office on your complaint against Moore Business Forms filed under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 2012.

The review included an examination of the entire case file, including any material filed with your request for reconsideration. Based on this analysis, the Director has determined that the decision of chicago Area Office was correct.

the determination is based on the following facts:

1. Your assertion that a contract with Vietnam era veteran is a contract with the U.S. Department of Labor is incorrect. The regulations at 41 CFR 60-1.3 state that the term "Government contract" does not include agreements in which the parties stand in the relationship of employer and employee.

2. There is extensive evidence in the file which proves that you were given considerable feedback regarding your performance and progress.

3. There are numerous written records in the file documenting the company's attempts to counsel you on your unsatisfactory job performance and poor communications with your peers and subordinates.

4. Your allegations that your job of Manager, National Sales/Marketing Systems was going to be eliminated, then was given to someone else is

incorrect. The positions of Manager National Sales/Marketing Systems and Manager, National Support Systems were combined and that position was given to the then current Manager of Support Systems.

5. There is no evidence in the file which supports your allegations that your termination was related to your status as a Vietnam ere veteran.

This concludes the Department's review of this complaint and exhausts the administrative procedures under the Act.

Sincerely,

Robert B. Greux
Director
Division of Program Operations

Appendix E

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

May 6, 1994

Before

Hon. Richard A. Posner, Chief Judge

Hon. Walter J. Cummings, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

RICHARD E. WIKBERG, *Plaintiff-Appellant,*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 93-2781	)	No. 91 C 7085
ROBERT B. REICH, Secretary of Labor, *Defendant-Appellee.*	)	George M. Marovich, *Judge.*

ORDER

On April 21, 1994, plaintiff-appellant filed a petition for rehearing. All of the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

Appendix F

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; now shall private property be taken for public use, without just compensation.

Appendix G

Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S. C § 2011 et. seq.

§ 2011. Definitions

(1) The term "special disabled veteran" means (A) a veteran who is entitled to compensation under laws administered by the Veterans' Administration for a disability rated at 30 percent or more, or (B(a person who was discharged or released from active duty because of a service-connected disability.

(2) (A) Subject to subparagraph (B) of this paragraph, the term "veteran of the Vietnam era" means an eligible veteran any part of whose active military, naval, or air service was during the Vietnam era.

(3) The term "disabled veteran" means (A) a veteran who is entitled to compensation under laws administrated by the Veterans' Administration, or (B) a person who was discharged or released from active duty because

of a service-connected disability.

(4) The term "eligible veteran" means a person who (A) served on active duty for a period of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge, or (B) was discharged or released from active duty because of a service-connected disability.

(5) The term "department or agency" means any agency of the Federal Government or the District of Columbia, including any Executive agency as defined in section 105 of title 5 [5 USCS § 105].

§ 2012. Veterans employment emphasis under Federal contracts.

(a) Any contract in the amount of $10,000 or more entered into by any department or agency for the procurement of personal property and non-personal services (including construction) for the United States, shall contain a provision requiring that the party contracting

with the United States shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era. The provisions of this section shall apply to any subcontract entered into by a prime contractor in carrying out any contract for the procurement of personal property and non personal services (including construction) for the United States. In addition to requiring affirmative action to employ such veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the President shall implement the provisions of this section by promulgating regulations which shall require that (1) each such contractor undertake in such contract to list immediately with the appropriate local employment service office all of its suitable employment openings, and (2) each such local office shall give such veterans priority in referral to such employment openings.

(b) If any special disabled veteran of the Vietnam era believes any contractor of the United States has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor, who shall promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations.

Appendix H

41 CFR § 60-250.4

(a) The contractor will not discriminate against any employee or applicant for employment because he or she is a disabled veteran or veteran of the Vietnam era in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified disabled veterans and veterans of the Vietnam era without discrimination based upon their disability or veterans status in all employment upgrading, demolition or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

Appendix I

41 CFR § 60-250.6 Affirmative action policy, practices and procedures.

(a) General requirements. Under the affirmative action obligation imposed by the Vietnam Era Veterans Readjustment Assistance Act of 1974, contractors are required to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era at all levels of employment, including the executive level. Such action shall apply to all employment practices, including, but not limited to, the following: hiring, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship and on-the-job training programs under 38 U.S.C. 1787.

Appendix J

41 CFR § 60-250.26 (a) Complaint procedures.

(a) Place and time for filing. any applicant for employment with a contractor or any employee of a contractor may, personally or by an authorized representative, file a written complaint with the Veteran's Employment Service of the Department of Labor through the Local Veteran's Employment Representative (LVER) or his designee at the local State employment office, alleging a violation of the Act or the regulations in this part. Local Veteran's Employment Representatives (LVERs) will assist veterans in preparing complaints and will promptly refer such complaints to the Director.

Appendix K

41 CFR § 60-250.26 (e)

(e) Investigations. The department of Labor shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record. A complete case record consists of the following: (1) Name and address of each person interviewed, (2) a summary of his or her statement, (3) copies or summaries of pertinent documents, (4) narrative summary of the evidence disclosed in the investigation as it related to each charge, and (5) recommended findings and resolution.

(2)

FILED
OCT 7 1994
OFFICE OF THE CLERK

No. 94-265

In the Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD E. WIKBERG, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA), 38 U.S.C. 4212 (Supp. IV 1992), requires parties who contract with the United States to agree to certain affirmative action requirements with respect to the employment of Vietnam-era veterans, and allows veterans to file complaints of noncompliance with the Secretary of Labor, who is instructed to "investigate such complaint and take appropriate action."

The question presented is whether VEVRA accords veteran employees of such contractors a "property right" in continued employment and, if so, whether the Fifth Amendment's Due Process Clause prevents the Department of Labor from deciding not to take action against the contractor without affording a complaining employee procedural protections such as the opportunity to cross-examine and otherwise test the credibility of witnesses.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-265

RICHARD E. WIKBERG, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30-38) is reported at 21 F.3d 188. The opinion of the district court (Pet. App. 39-53) is reported at 62 Empl. Prac. Dec. (CCH) ¶ 42,618.

JURISDICTION

The court of appeals entered its judgment on April 7, 1994. A petition for rehearing was denied on May 6, 1994. Pet. App. 65. The petition for a writ of certiorari was filed on August 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioner incorrectly lists "Richard B. Reich" as respondent.

STATEMENT

1. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA), 38 U.S.C. 4211 *et seq.* (Supp. IV 1992), requires parties who contract with the United States to agree to take affirmative action to employ and advance in employment Vietnam-era veterans. 38 U.S.C. 4212(a) (Supp. IV 1992). The Act also entitles a Vietnam-era veteran who believes a contractor has violated the Act to file a complaint with the Secretary of Labor, and requires the Secretary to "promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations." 38 U.S.C. 4212(b) (Supp. IV 1992). Pursuant to regulations promulgated by the Secretary, the Department of Labor's remedies for noncompliance include withholding progress payments to contractors, terminating contracts, barring contractors from receiving future contracts, and "within the limitations of applicable law, seek[ing] appropriate judicial action." 41 C.F.R. 60-250.28(b)-(e).

2. Petitioner is a Vietnam-era veteran who obtained employment in March 1985 as a sales manager with Moore Business Forms, a government contractor. Petitioner alleges that he was hired even though he did not meet the firm's usual qualifications for the post. Pet. App. 31, 57; Pet. 10-11. In October 1986, Moore terminated petitioner, claiming that his performance had been unsatisfactory. Pet. App. 31-32. Petitioner thereupon filed a complaint with the Department of Labor, alleging that the termination violated VEVRA.[2]

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[2] At the time petitioner filed his complaint, the relevant VEVRA provisions were codified at 38 U.S.C. 2011 *et seq.* The provisions have since been recodified. See Department of Veterans

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) investigated petitioner's complaint. See 41 C.F.R. 60-250.25. In March 1988, OFCCP notified petitioner that it had found no evidence that his status as a veteran had had any impact on his termination. Pet. App. 61. Instead, OFCCP found that Moore, which employed a number of Vietnam-era veterans in responsible positions, had fired petitioner because of documented problems with his performance—problems about which petitioner had been warned, yet failed to correct. *Ibid.* On petitioner's request for reconsideration,[3] the Director of OFCCP, in August 1988, ruled that the earlier determination had been correct. He noted that Moore's files contained numerous records reflecting petitioner's "unsatisfactory job performance and poor communications with [his] peers and subordinates" (*id.* at 63), and found no evidence that petitioner's termination was related to his status as a Vietnam veteran. *Id.* at 62-64. The Department of Labor therefore concluded its review of petitioner's complaint without taking any action against Moore. *Id.* at 42, 64.

Affairs Codification Act, Pub. L. No. 102-83, § 5, 105 Stat. 406 ; Pet. 10.

[3] Petitioner's appendix omits the last paragraph of OFCCP's March 1988 notification (R 12 Exh. B) which states:

> As set forth in 41 CFR 60-741.6(g), the Director of the Office of Federal Contract Compliance Programs may, for reasonable cause, reconsider or order the reconsideration of this determination. A request for reconsideration based on reasonable cause should be addressed, within 30 days, to the Director, OFCCP, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, D.C. 20210. Such a request should be accompanied by affidavits, signed testimony of supervisory or fellow workers, or other written documentation that would substantially alter our findings in this case.

3. In November 1991, petitioner brought suit in federal district court against the Secretary of Labor, alleging that the Department's action violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 42. The district court dismissed this complaint on the ground that the Department's enforcement decision was unreviewable under the Administrative Procedure Act. *Ibid.* Petitioner then filed an amended complaint alleging, *inter alia*, that OFCCP had violated his due process rights by not allowing him to present his own evidence controverting his employer's evidence, or to cross-examine or otherwise challenge the veracity of the evidence that his employer, Moore, had submitted to the Department in response to the investigation. *Id.* at 33, 40.[4]

The district court dismissed the amended complaint for failure to state a claim. Pet. App. 39-53. The court held that VEVRA does not provide veterans such as petitioner with a constitutionally protected property interest in employment. Instead, it held, the Act merely gives veterans a right to petition the Department of Labor to enforce an employer's obligations under that statute. *Id.* at 44-49. The court also concluded that the Department's decision not to take action against Moore did not give rise to a due process violation because it was an investigatory, not an adjudicatory, proceeding, and traditional notions of due process do not attach to such fact-finding investigations. *Id.* at 49-50.

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[4] Petitioner also argued below that OFCCP violated the Equal Protection component of the Fifth Amendment's Due Process Clause, and that he was a third-party beneficiary of a contract between the government and his employer. Pet. App. 35, 38. As the court of appeals noted, petitioner failed properly to raise or to preserve these claims, *ibid.*, and he has not pursued them in this Court.

4. The court of appeals affirmed. Pet. App. 30-38. It found no due process violation because petitioner lacked a constitutionally protected property interest. *Id.* at 35. The court explained that petitioner was an employee at will, and, as such, had "no legal right of any sort to continued employment." *Ibid.* Moreover, the court held, even if petitioner had an employment contract of fixed duration giving rise to a contractual property right, he was deprived of that right not by the Department of Labor, but by his employer, Moore. *Id.* at 36. Nor, the court held, did any failure by the Department to protect petitioner's asserted property rights by taking action against Moore "count as a deprivation of that interest by the government itself." *Ibid.* (citing *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989)). Finally, the court rejected petitioner's claim that VEVRA, by imposing a duty of prompt investigation and appropriate action, conferred a property interest beyond "the usual 'right' to the aid of the law enforcement authorities." Pet. App. 37. Procedural rights, the court held, "are not rights of liberty or property within the meaning of the due process clause." *Id.* at 38 (citing, *inter alia*, *Olim* v. *Wakinekona*, 461 U.S. 238, 250-251 (1983)).

ARGUMENT

Petitioner renews his claim (Pet. 17-28) that VEVRA accords him a constitutionally protected property interest in continued employment and that he was unconstitutionally deprived of that interest when the Labor Department elected not to take action against his employer. Petitioner's claim is without merit under well-settled authority of this Court, and the decision below presents no circuit conflict warranting review. Accordingly, review should be denied.

1. To establish a due process violation, a party must first establish the existence of a property interest in existing rules or understandings outside the Constitution. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Such an interest must be based on a legitimate claim of entitlement, not on a mere desire or unilateral expectation of receiving a benefit. *Roth*, 408 U.S. at 577. Moreover, procedural safeguards do not by themselves "create an independent substantive right" protected by the Due Process Clause. *Olim* v. *Wakinekona*, 461 U.S. 238, 250-251 & n.12 (1983); see *Hewitt* v. *Helms*, 459 U.S. 460, 471 (1983). Such a right is created only if the governing statute or regulation contains "specific directives to the [governmental] decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Kentucky Dep't of Corrections* v. *Thompson*, 490 U.S. 454, 463 (1989).[5]

A party claiming a due process violation based on deprivation of a property right must further establish that the deprivation of that right was the result of governmental, and not merely private, action. *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989); *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 547 (1987). The government is responsible for a private decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *San Francisco Arts*, 483 U.S. at

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[5] Although *Olim* and *Kentucky Department of Corrections* involved liberty interests, the same principles apply to the creation of property interests. See, *e.g.*, *Tarpeh-Doe* v. *United States*, 904 F.2d 719, 722-723 (D.C. Cir. 1990), cert. denied, 498 U.S. 1083 (1991).

546. Absent "certain limited circumstances," *DeShaney*, 489 U.S. at 198-200, such as where the government has assumed the custody of persons against their will, the government has no affirmative duty to protect the property of an individual against invasion by private actors, and "'[m]ere approval of or acquiescence in the initiatives'" of the private actor "is not enough." *San Francisco Arts*, 483 U.S. at 547.

Petitioner has failed to establish either a cognizable property interest or a deprivation of that interest by the government. As the court held (Pet. App. 35), petitioner, an at-will employee, had no contractual right to continued employment that was abridged by his termination. And, contrary to petitioner's claim (Pet. 22), neither VEVRA nor the Department of Labor's regulations that require contractors to agree not to discriminate against veterans (see 41 C.F.R. 60-250.4) give petitioner a property right in not being terminated based on his status as a veteran. Neither VEVRA nor its regulations explicitly establish such a right, nor do they contain mandatory language placing substantive limits on the Department's enforcement discretion. See *Olim*, 461 U.S. at 250-251 & n.12; *Kentucky Dep't of Corrections*, 490 U.S. at 463. Thus, as the court of appeals concluded, the Department's "duty of prompt investigation and appropriate action" created no property interest within the meaning of the Due Process Clause. Pet. App. 37-38; *id.* at 45 ("[t]he only right created by VEVRA is the right to petition the Department of Labor to enforce the employers' contractual obligations created by the statute"). See *Harris* v. *Adams*, 873 F.2d 929, 932 (6th Cir. 1989) (holding that VEVRA does not authorize private rights of action); *Barron* v. *Nightingale Roofing, Inc.*, 842 F.2d 20, 22 (1st Cir. 1988) (same). VEVRA is thus analogous

to parallel statutes requiring federal contracts to contain affirmative action clauses, which have uniformly been held not to create an entitlement to employment. See, *e.g.*, *D'Amato* v. *Wisconsin Gas Co.*, 760 F.2d 1474, 1479-1480 (7th Cir. 1985) (holding that the only right secured to handicapped persons by parallel provision of the Rehabilitation Act of 1973, 29 U.S.C. 793, was the right to file complaint against employer with Department of Labor); *Brown* v. *Sibley*, 650 F.2d 760, 764 (5th Cir. 1981); *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226, 244 (7th Cir. 1980); *Rogers* v. *Frito-Lay*, 611 F.2d 1074, 1080 (5th Cir. 1980). The Department of Labor's refusal to take action against Moore thus did not deprive petitioner of a property interest.

Petitioner's reliance on *McGee* v. *Funderburg*, 17 F.3d 1122, 1125 (8th Cir. 1994), for the proposition that VEVRA accorded him an "earned entitlement" (Pet. 20) is misplaced. At issue in *McGee* were military retirees' health benefits, and the effect of the Civilian Health and Medical Program of the United States (CHAMPUS) upon continuation coverage under the Employee Retirement Income Security Act of 1974, (ERISA), 29 U.S.C. 1001 *et seq.* as amended by the Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, § 10002, 100 Stat. 227, 29 U.S.C. 1161-1168 (1988 & Supp. IV 1992). No claim under the Due Process Clause or VEVRA was raised in that case. The reference in *McGee* to veterans employment preferences as "entitlements" came simply in the course of listing various statutory benefits accorded for members of the armed forces "in gratitude for service to their country and as a means of enhancing and making more attractive service in the armed forces of the United States." 17 F.3d at 1125. *McGee* thus does not suggest that VEVRA creates any statutory entitlement in continued private

employment, the deprivation of which suffices to constitute a due process violation.[6]

The court of appeals also correctly held (Pet. App. 36-37), following *DeShaney*, that even if petitioner had established a property right in continued employment, the Department of Labor's failure to protect that right against the actions of a private party (Moore) would not constitute a governmental deprivation actionable under the Due Process Clause. Petitioner's reliance on the fact that he was hired pursuant to the contractual affirmative action provisions mandated by VEVRA (Pet. 27) is misplaced, for that fact does not establish that the Department had any role in Moore's decision to terminate petitioner, let alone that it exercised the coercive power or supplied the significant encouragement necessary for the Department to be held responsible under the Due Process Clause for his loss of employment. See *San Francisco Arts*, 483 U.S. at 546-547; see also *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985) ("when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect"); *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984) (Due Process Clause not implicated where an administrative investigation adjudicates no legal rights); *Hannah* v. *Larche*, 363 U.S. 420 (1960) (Due Process Clause does not

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[6] Petitioner errs in relying (Pet. 21) on *Miller* v. *Henman*, 804 F.2d 421 (7th Cir. 1986), and *Hill* v. *Group Three Housing Dev. Corp.*, 799 F.2d 385 (8th Cir. 1986), for the proposition that binding regulations with substantive criteria may create property interests. *Miller* held that a prisoner's transfer did not constitute a denial of due process, and *Hill* held that the denial of applications for housing assistance payments under a federal program did not constitute a denial of due process.

create right to participate in agency's nonadjudicative, factfinding investigation); cf. *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 114, 125-126 (1987) (decisions whether to file a complaint, as well as settlement or dismissal determinations, made without charging party's consent, are prosecutorial, not adjudicative).[7]

2. We are aware of no authority in conflict with the decision below. Nor is this a case with broad national implications warranting this Court's review. Although petitioner asserts (Pet. 28) that this case could affect potentially seven million Vietnam-era veterans in the labor force, VEVRA affects only those Vietnam-era veterans who work for or seek employment with employers who have contracts over $10,000 with the federal government. 38 U.S.C. 4212(a) (Supp. IV 1992); see also 41 C.F.R. 60-250.3(a) (including subcontracts). OFCCP has investigated a total of 813 complaints by such veterans in the last five fiscal years.

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[7] *Heckler* v. *Chaney* held that agency non-enforcement decisions are not reviewable under the Administrative Procedure Act, 5 U.S.C. 701-706, unless there is "law to apply." 470 U.S. at 834-835. While *Chaney* is not strictly dispositive here because petitioner's amended complaint alleged constitutional violations rather than an agency's failure to take enforcement action under its statutory authority, see Pet. App. 32-33, complaints challenging nonenforcement decisions under either VEVRA or analogous statutes have consistently been dismissed based on *Chaney*. See *Clementson* v. *Brock*, 806 F.2d 1402, 1404 (9th Cir. 1986) (Kennedy, J.) (Labor Department's nonenforcement decision under VEVRA not reviewable under APA because of absence of law to apply); *Giacobbi* v. *Biermann*, 780 F. Supp. 33, 36 (D.D.C.) (nonenforcement decision under Rehabilitation Act of 1973, 29 U.S.C. 793, not reviewable under APA), aff'd, No. 92-5095 (D.C. Cir. Oct. 6, 1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-265

In The

Supreme Court of the United States

October Term, 1994

RICHARD E. WIKBERG,

Petitioner,

v.

ROBERT REICH, SECRETARY OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's arguments point out the reasons that this Court should grant the petition. Respondent does not dispute that this Court has not resolved the issues presented by the petition;

those issues are ripe for resolution in this case.

I. The Court Should Grant The Petition To Resolve The Question Whether VEVRA Creates A Property Right Which Cannot Be Terminated Without Affording Constitutional Due Process.

Nowhere in its arguments does Respondent controvert the assertion that this Court has consistently reserved its judgment on judicial review of agencies' actions where constitutional claims have been presented. Both Heckler v. Chaney, 470, U.S. 821 (1985) and DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), expressly held that this Court did not address, respectively, the issue of judicial review where constitutional claims are raised nor did it address the issue of statutory "entitlement" conferred by statute. Chaney at 838; DeShaney at 195 footnote 2. Inasmuch as these issues have rarely, if

ever, have been raised, this Court has expressly reserved its opinion thereon. This case squarely raises such issues.

With this Court's guidance, issues arising from the creation of property interests by statutes may be resolved and the precedential void left by Chaney and DeShaney may be filled. As a consequence there may be a final resolution of the ultimate issue of when and to what extent judicial review of an agency's action is available where constitutional claims are raised.

II. The Court Should Grant The Petition To Fully and Finally Distinguish VEVRA From Ostensibly Similar But Wholly Different Affirmative Action Statutes.

In its arguments Respondent erroneously attempts to analogize VEVRA to the Rehabilitation Act of 1973, 29 U.S.C. 793, citing several authorities which have

construed such Act to confer upon handicapped persons only the right to file a complaint against an employer with the Department of Labor. Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 244 (7th Cir. 1980); Rogers v. Frito-Lay, 611 F.2d 1074, 1080 (5th Cir. 1980). Such comparison is specious. While certain language of the Rehabilitation Act is similar to that of VEVRA the legislative roots of VEVRA are completely independent to those of the Rehabilitation Act. Therefore, Respondent's reasoning to construe an identity between VEVRA and the Rehabilitation Act is defective. Specifically, VEVRA springs from and is an extension of Servicemens' Readjustment Act of 1944 (PL 346, 22 June 1944), United Statutes at Large 58, pp. 284-300, commonly known as "G.I. Bill" or "G.I. Bill of Rights". *See* S. Rep. No. 94-1243,

94th Cong., 2nd Session (1976), *reprinted in* 1976 U.S.C.C.A.N. 5241. This is all to say that the affirmative action language as it applies to VEVRA is merely a *procedure* to enforce the underlying substantive provisions of VEVRA. It is such substantive provisions of VEVRA which are Petitioner's "property rights" not as Respondent asserts, the procedural mechanisms used to enforce such rights. A close analysis of congressional explication of the G.I. Bill reveals that Congress intended judicial review to be available to aggrieved claimants. Congress did not view veterans' benefits as mere gratuities but instead allowed that such benefits could be construed as "legal obligations" imposed upon the government. House Report No. 2031, 86th Congress, 2nd Session (1960), reprinted in serial sets Volume 5, Serial 12246. Accordingly, VEVRA and the Rehabilitation

Act should be distinguished and the latter should not serve as a guide for the construction of the former.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

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